

FILED

03 DEC 16 PM 3:14

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

U.S. DISTRICT COURT
N.D. OF ALABAMA.

[Handwritten signature]

UNITED STATES OF AMERICA,

v.

CR-03-BE-0530-S

RICHARD M. SCRUSHY,

Defendant.

DEFENDANT'S MOTION TO MODIFY CONDITIONS OF RELEASE

(Authorities Included)

Defendant Richard M. Scrushy respectfully submits this Motion to Modify
Conditions of Release.

Procedural History

The Indictment in this case was unsealed on November 4, 2003. On that same day, this Court held its initial appearance and arraignment. During those proceedings, an Order setting out conditions for Mr. Scrushy's release was entered. Exhibit A, November 4, 2003 Order Setting Conditions of Release. On the very day the Order was entered, Mr. Scrushy began working with officials in the Probation Office to fulfill and comply with the conditions imposed. Since that date, he has complied with all the conditions and requests the Probation Office has made. In addition, over the past month and a half, he has traveled within the entire State of Alabama and outside the State with express permission from the Probation Office and the Court to do so. On some occasions, these

trips have been via automobile, in some by commercial aircraft, and some in private aircraft (twice accompanied by counsel).

Over the past few weeks, undersigned counsel has met with the official from the Probation Office, Ms. Donna Lefebvre, assigned to Mr. Scrushy's case to discuss how the conditions of release might be adjusted to more precisely achieve the results of insuring the defendant's presence at trial, allow for more realistic notification and monitoring by the Probation Office, and allow Mr. Scrushy to carry on his business and preparation of his defense. In addition, counsel has discussed such modifications with the Department of Justice and U.S. Attorney's Office, and wrote on November 21, 2003 wrote a letter trying to arrive at a negotiated resolution. Exhibit B, Abbe D. Lowell, November 21, 2003 to Richard C. Smith. The Probation Office has indicated that it could be satisfied with different conditions as long as they are approved by the Court. The Government has indicated that it could agree with some of the suggested modifications but not with others. These few differences will be highlighted.

Argument

On the day this Court imposed its initial conditions, it specifically stated that these were initial conditions which could be reviewed and revisited. [November 4, 2003 Transcript, at 30-31.] Mr. Scrushy respectfully requests that the Court undertake that review.

A great deal of space is not required to set out the purposes for bail conditions. This Court applies the standards dozens of times a month and hundreds of times a year to

the cases before it. See United States v. Rose, 791 F.2d 1477, 1480 (11th Cir. 1986) (quoting United States v. Powell, 639 F.2d 224, 225 (5th Cir. 1981) ("the purpose . . . is to secure the presence of the defendant; . . . not to enrich the government or punish the defendant). In addition, the working principle in applying conditions is for the least restrictive conditions that can assure the presence of the defendant to be imposed. 18 U.S.C. § 3142 (c)(1)(B)("least restrictive further condition"); Brown v. United States, 392 F.2d 189 (5th Cir. 1968). Further, it is almost axiomatic that initial conditions of release often give way to changes once time has passed for the emotions of the original arrest or arraignment to subside and for the parties to determine how the conditions have worked and whether the right balance has been struck. Cases too numerous to cite reflect circumstances where courts subsequently loosen the restrictions placed on a defendant at an initial appearance.

The Court is aware that Mr. Scrushy knew he was a target of a grand jury investigation for months and that the Government sought to restrain or freeze his assets. He stayed at home in Alabama waiting for the charges to come. Even after the charges were filed and their seriousness felt, including yet another draconian asset freeze, he stayed home in Alabama, though released. The reason is simple. It is his desire to clear his name and provide for his family, including small children he would never leave.

Furthermore, in the materials attached hereto, have indicated how the conditions imposed on Mr. Scrushy are far more severe than those imposed on other corporate officials who have been charged. These other officials face similarly serious charges,

including RICO and forfeiture counts. Some of these officials have access to planes, maintain foreign property, and have had foreign bank accounts. Many of them do not have nearly the ties to their communities that Mr. Scrushy has to Alabama. Exhibit C. This comparison also supports the few modifications Mr. Scrushy is seeking.

Among the initial conditions of release were the standard requirements for appearance at proceedings, restrictions in possessing firearms, surrender of a passport, not contacting potential witnesses, and working out reporting and monitoring with the U.S. Probation Office.

With the time that has passed and Mr. Scrushy's compliance, he now seeks some modifications as follows:

Defendant's Request (1): Mr. Scrushy's ability to travel without advance notification in the State of Alabama would be extended to the entire state, including the Southern District; when in Alabama, Mr. Scrushy would report to the U.S. Probation Office consistent with the requests and procedures he has and would continue to work out with the office (e.g., frequency of calls, time of day, type of phone-ins).

Government Response: The Government does not object to Mr. Scrushy's traveling in other parts of Alabama except for Baldwin and Mobile counties.

Mr. Scrushy's father lives in the Southern District of Alabama. He is 82 years old and is fighting cancer. Recently, he had a blood clot in his groin which required emergency medical treatment. There is no reason to deny Mr. Scrushy the ability to visit his elderly and ill father as often as he can. In addition, Mr. Scrushy owns and operates a marina business and owns investment properties in the Southern District. In order for him to operate this business and develop or

maintain these properties, it requires personal visits from him from time to time.

It appears that the original rationale for excluding the Southern District was the fact that it has access to the coast. However, Mr. Scrushy has already shown his intention is to appear and fight the charges. Moreover, the distinction between one part of Alabama and another is not effective. If it had been his intent to flee, he could have (and still could) easily gone to the southern border of the Middle District, pass into Florida (where there are no border guards) and gain access to the coast in that fashion.

Defendant's Request (2): Mr. Scrushy would have the ability to travel to New York City, Washington, D.C. and Atlanta to meet with attorneys and others to prepare for his trial (e.g., with experts working under the direction of his counsel) and also to accompany his children for medical care they are receiving in New York; when such a trip is contemplated, he would give the Probation Office 24-hour notice and would provide the Office with his itinerary including the place he would be staying; he would report to the Probation Office while in those locations in a method and frequency acceptable to the Office (e.g., calling from a land line so that caller identification would verify his location); whenever Mr. Scrushy was out of the state his counsel would be responsible as well to know his whereabouts and to report to the Probation Office if they sought such verification.

Government Response: The Government does not object to Mr. Scrushy's travel to these locations under procedures acceptable to the U.S. Probation Office by commercial aircraft. If he intends to travel by private aircraft, however, they insist that he take with him one of his attorneys.

Currently, Mr. Scrushy has made such trips out of state in both commercial and private aircraft. When he has taken private aircraft, the U.S. Attorney has insisted that he take along an attorney. This requirement is not necessary advance and causes a number of problems. Instead, a requirement that he provide

notice and his itinerary, check in at the front and back end of flights, and require his counsel to verify his locations (as well as his checking in from those locations) should suffice. The condition that he has some attorney on board provides illusory protection. Again, it cannot be repeated enough that Mr. Scrushy's actions to date confirm his desire to face the charges filed against him. Had that not been the case, he had ample opportunity before and after the filings of charges to flee. If it had been his intent to leave, an attorney on a plane would not have been able to stop him in any event. Neither Mr. Scrushy nor an attorney would be the pilot. The attorney has no idea where the plane was in the air. Certainly no one expects his counsel to engage Mr. Scrushy physically if it was Mr. Scrushy's desire to get away. And, this provision is very burdensome. It unnecessarily invades the privacy of the Scrushy family and causes unnecessary costs and fees for the attorney's time and lodging and meals not needed to actually provide legal services.

Defendant's Request (3): Mr. Scrushy would be allowed to visit his investment property in Florida once a month and when doing so comply with the same requirements for his travel outside of Alabama for medical or legal reasons.

Government Response: The Government opposes this request.

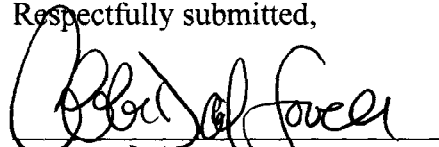
As Mr. Scrushy is allowed to operate his real estate business and travel outside the state for legal and medical reasons, there is no basis to deny him the ability to

be involved with his other property on some schedule and with provisions for reporting worked out with the Probation Office.

CONCLUSION

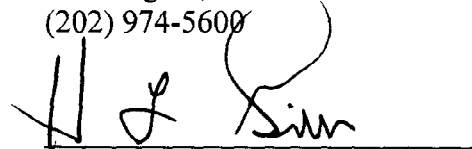
For the foregoing reasons, the defendant seeks modifications to the existing conditions of release and asks the Court to enter an Order granting his motion.

Respectfully submitted,



Abbe David Lowell, Esq.
Thomas V. Sjoblom, Esq.

Chadbourne & Parke, LLP
1200 New Hampshire, Ave. NW
Washington, D.C. 20036
(202) 974-5600



H. Lewis Gillis, Esq.

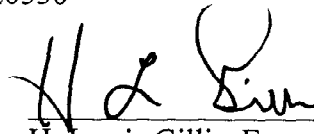
Thomas, Means, Gillis & Seay
1035 Financial Center
505 20th Street North
Birmingham, Alabama 35203
(205) 328-7915

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Modify Conditions of Release was served by facsimile and first class mail to:

Alice Martin, Esquire
United States Attorney for the
Northern District of Alabama
U.S. Department of Justice
1801 4th Avenue North
Birmingham, Alabama 35203

Richard C. Smith, Esquire
Deputy Chief
Fraud Section
U.S. Department of Justice
10th and Constitution Avenue, N.W.
Washington, D.C. 20530

A handwritten signature in black ink, appearing to read 'H. Lewis Gillis', is written over a horizontal line.

H. Lewis Gillis, Esq.
Thomas, Means, Gillis & Seay
1035 Financial Center
505 20th Street North
Birmingham, Alabama 35203
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

FILED

UNITED STATES OF AMERICA

03 NOV -4 PM 4:46

U.S. DISTRICT COURT
N.D. OF ALABAMA

vs.

CASE NUMBER CR 03-BE-0530-S



ENTERED

RICHARD M. SCRUSHY

NOV 04 2003

ORDER SETTING CONDITIONS OF RELEASE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

IT IS ORDERED that the release of the defendant is subject to the following conditions:

- (1) The defendant shall not commit any offense in violation of federal, state or local law while on release in this case.
- (2) The defendant shall immediately advise the court, defense counsel and the U. S. attorney in writing before any change in address and telephone number.
- (3) The defendant shall appear at all proceedings as required and shall surrender for service of any sentence imposed as directed. The defendant shall next appear for TRIAL, on Monday, January 5, 2004, at 9:00 a.m., at the Hugo L. Black U.S. Courthouse, 1729 - 5th Avenue, North, Birmingham, Alabama 35203, before the Honorable Karon O. Bowdre, U.S. District Judge, Courtroom 5A.

Release on Personal Recognizance or Unsecured Bond

IT IS FURTHER ORDERED that the defendant be released provided that:

- (✓) (4) The defendant promises to appear at all proceedings as required and to surrender for service of any sentence imposed.
- 0 (5) The defendant executes an unsecured bond binding the defendant to pay the United States the sum of dollars (\$) in the event of a failure to appear as required or to surrender as directed for service of any sentence imposed.

Additional Conditions of Release

Upon finding that release by one of the above methods will not by itself reasonably assure the appearance of the defendant and the safety of other persons and the community, it is **FURTHER ORDERED** that the release of the defendant is subject to the conditions marked below:

- () (6) The defendant is placed in the custody of:
(Name of person or organization)
(Address)
(City and State) (Tel. No.)

who agrees (a) to supervise the defendant in accordance with all conditions of release, (b) to use every effort to assure the appearance of the defendant at all scheduled court proceedings, and (c) to notify the court immediately in the event the defendant violates any conditions of release or disappears.

Signed: _____

Signed: _____

- (XXX) (7) The defendant shall:
- () (a) maintain or actively seek employment.
 - () (b) maintain or commence an educational program.
 - (✓) (c) abide by the following restrictions on his personal associations, place of abode, or travel: be restricted to travel only in the Northern District of Alabama and the Middle District of Alabama, except with any prior approval by the Court with an appropriate itinerary.
 - () (d) avoid all contact with the following named persons, who are considered either alleged victims or potential witnesses:
 - (✓) (e) report to the U.S. Probation Officer, submit to electronic monitoring and voice monitoring, all in a manner as directed by the probation officer.
 - () (f) comply with the following curfew:
 - (✓) (g) refrain from possessing a firearm, destructive device, or other dangerous weapon.
 - () (h) refrain from excessive use of alcohol, and any use or unlawful possession of narcotic drug and other controlled substances defined in 21 U.S.C. §802 unless prescribed by a licensed medical practitioner.
 - () (i) undergo medical or psychiatric treatment and/or remain in an institution as follows:
 - (✓) (j) execute a bond or agreement to forfeit upon failing to appear as required, the following sum of money or designated property:
 - () (k) post with the court the following indicia of ownership of the above-described property, or the following amount or percentage of the above-described money:
 - () (l) execute a bail bond with solvent sureties in the amount of
 - (✓) (m) surrender any passport and keys to his airplane and pilot license to the U.S. Probation Officer.
 - () (n) obtain no passport.
 - (✓) (o) **THE DEFENDANT SHALL NOT CONTACT, HARASS, INTIMIDATE, OR THREATEN ANY PERSON IN VIOLATION OF 18 U.S.C. §§ 1503, 1510, 1512 AND 1513.**

Advice of Penalties and Sanctions

TO THE DEFENDANT:

YOU ARE ADVISED OF THE FOLLOWING PENALTIES AND SANCTIONS:

A violation of any of the foregoing conditions of release may result in the immediate issuance of a warrant for your arrest, a revocation of release, an order of detention, and a prosecution for contempt of court and could result in a possible term of imprisonment or a fine.

The commission of any crime while on pre-trial release may result in an additional sentence to a term of imprisonment of not more than ten years, if the offense is a felony; or a term of imprisonment of not more than one year, if the offense is a misdemeanor. This sentence shall be in addition to any other sentence.

Federal law makes it a crime punishable by up to five years of imprisonment, and a \$250,000 fine or both to intimidate or attempt to intimidate a witness, victim, juror, informant or officer of the court, or to obstruct a criminal investigation. It is also a crime punishable by up to ten years of imprisonment, a \$250,000 fine or both, to tamper with a witness, victim or informant, or to retaliate against a witness, victim or informant, or to threaten or attempt to do so.

If after release, the you knowingly fail to appear as required by the conditions of release, or to surrender for the service of sentence, you may be prosecuted for failing to appear or surrender and additional punishment may be imposed. If you are convicted of:

- (1) an offense punishable by death, life imprisonment, or imprisonment for a term of fifteen years or more, you shall be fined not more than \$250,000 or imprisoned for not more than ten years, or both;
- (2) an offense punishable by imprisonment for a term of five years or more, but less than fifteen years, you shall be fined not more than \$250,000 or imprisoned for not more than five years, or both;
- (3) any other felony, you shall be fined not more than \$250,000 or imprisoned not more than two years, or both;
- (4) a misdemeanor, you shall be fined not more than \$100,000 or imprisoned not more than one year, or both.

A term of imprisonment imposed for failure to appear or surrender shall be in addition to the sentence for any other offense. In addition, a failure to appear or surrender may result in the forfeiture of any bond posted.

Acknowledgement of Defendant

I acknowledge that I am the defendant in this case and that I am aware of the conditions of release. I promise to obey all conditions of release, to appear as directed, and to surrender for service of any sentence imposed. I am aware of the penalties and sanctions set forth above.


RICHARD M. SCRUSHY

Directions to United States Marshal

(✓)
0

The defendant is ORDERED released after processing.

The United States marshal is ORDERED to keep the defendant in custody until notified by the clerk or judicial officer that the defendant has posted bond and/or complied with all other conditions for release. The defendant shall be produced before the appropriate judicial officer at the time and place specified, if still in custody.

November 4, 2003


T. MICHAEL PUTNAM, CHIEF MAGISTRATE JUDGE

CHADBOURNE
& PARKE LLP

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1200 New Hampshire Avenue NW, Washington, DC 20036
tel 202-974-5600 fax 202-974-5602

November 21, 2003

VIA FACSIMILE AND FIRST CLASS MAIL

Richard C. Smith, Esquire
Deputy Chief, Fraud Section
Department of Justice
Criminal Division
10th and Constitution Avenue, N.W.
Washington, D.C. 20530

Michael Rasmussen, Esquire
United States Attorney Office
Northern District of Alabama
Criminal Division
1801 Fourth Avenue North
Birmingham, Alabama 35203

Re: United States v. Scrushy

Dear Richard and Michael:

I appreciate your willingness to discuss modifications to the conditions of release that were imposed on our client by the Magistrate Judge on November 4, 2003. I have been able to secure a copy of the transcript of that hearing so that I could understand what was said and done. With that in mind, I am writing this letter.

As you know, the Court specifically suggested that the conditions it was imposing were the initial ones and could be revisited. Between the time when his attorneys first learned that Mr. Scrushy was going to be charged with very serious offenses and that there was going to be an asset freeze of some kind and the present, there have been any number of opportunities for Mr. Scrushy to flee. He has not done so. In fact, Mr. Scrushy was aware that he was a target or subject of a grand jury from March 2003 and saw fourteen different Health South officials, some of whom implicated him, plead guilty to serious felonies. He still did not take any steps to flee or hide assets. Then, from the time Judge Johnson ruled against the SEC's asset freeze request until now, he still took no steps to flee or abscond with any assets. If in the sober moments of absorbing the charges after the arrest, he would have changed his mind and then decided to flee, he also has not done so, even in the period where the electronic monitoring was not in place. I will not go into here the reasons why Mr. Scrushy is not a flight risk, but you know his deep roots in the community and the family he would be leaving behind. You also know that he is such a high-profile individual that there would be no place he could go where he would not be recognized and identified.

You requested that I send and I did send a comparison chart to show the conditions of release of other corporate executives. Richard's initial response was that none of them were exposed to 650 years of prison. Putting aside the rhetoric of that statement (you know as well as I that the sentencing guidelines group offenses and that sentences are not calculated by

taking 85 counts and multiplying them by the maximum for each count), any number of these officials are facing such serious charges that, given their ages, they too would be facing the rest of their lives or productive lives in prison. None of these individuals have conditions of travel nearly as onerous as Mr. Scrushy. In addition, many of these individuals have substantial means (some more than Mr. Scrushy), including some who maintain foreign assets and airplanes.

I explained to you that I also have met with Ms. Lefebvre at the Probation Office to go over the present situation and to suggest ways that modifications might occur that would provide her and the Court with assurance of appearance and that would also be more easily enforceable. So with this brief background, I would like the following conditions:

- (1) There would be no change in the financial aspects of the bond.
- (2) Mr. Scrushy's ability to travel in the State of Alabama would be extended to the entire state, including the Southern District. As I mentioned, Mr. Scrushy's father lives in the Southern District. He is 82 years old and is fighting cancer. Just a week or so ago, he had a blood clot in his groin which required emergency medical treatment. There is no reason to deny Mr. Scrushy the ability to visit with his elderly and ill father as often as he can. In addition, Mr. Scrushy owns and operates a marina business and owns investment properties in the Southern District. In order for him to operate this business and develop or maintain these properties, it does require frequent visits from him personally. Indeed, the only "rationale" for excluding the Southern District, I suppose, is the notion that it has access to the coast. The fallacy of that distinction is not only Mr. Scrushy's track record of staying put since this all began and not only that he is allowed to travel out of state by airplane now, but the fact that he could easily go to the southern border of the Middle District, pass into Florida (there are no border guards) and gain access to the coast in that fashion (were that his intent). When in Alabama, Mr. Scrushy would report to the Probation Office consistent with their requests and procedures, consistent with the Court's original order.
- (3) Mr. Scrushy would have the ability to travel to New York City (Southern District of New York), Washington, D.C. (District of the District of Columbia) and Atlanta (Northern District of Georgia) to meet with attorneys and to prepare for his trial (e.g., with experts working under the direction of his counsel) and also to accompany his children for medical care they are receiving in New York. When such a trip is contemplated, he would give the Probation Office 24-hour notice and would provide the Office with his itinerary including the place he would be staying. He would report to the Probation Office while in those locations in a method and frequency acceptable to the Office (e.g., calling from a land line so that caller identification would verify his location). Whenever Mr. Scrushy was out of the state his counsel would be responsible as well to know his whereabouts and to report to the Probation Office if they sought such verification. Instead of the requirement that some attorney actually travel with Mr. Scrushy, the requirement that he provide notice and his itinerary, check in at

BOND CONDITIONS FOR CORPORATE EXECUTIVES

NAME/TITLE	COMPANY	<u>VENUE</u>	<u>DATE OF BOND</u>	<u>BOND</u>	NEWS SOURCE	<u>DATE</u>
Daniel Bayly V.P.; James Brown; Robert Furst/(former execs.)	Merrill Lynch	SD TX Cr.No. 03-363	9/17/03	\$100,000 bond each and surrender of each passport.	FoxNews.com	9/17/03
Bernard Ebbers/(former CEO)	WorldCom	OK State Ct	9/3/03	\$50,000 bond.	Transcript of CNBC: Business Center broadcast	9/3/03
Andrew Fastow/(former CFO)	Enron	SD TX, No. H- 02-889-M	10/2/02	\$5 million cash bond and pledge of four properties. Travel limited to Texas and California, where his lawyer has offices. Requested and received permission to travel beyond that for specific purposes. He and his wife turned over their passports. Restraining order to preserve property subject to forfeiture and restrain assets as condition of release.	U.S News & World Report; New York Daily News BNA	12/30/02 7/31/03

NAME/TITLE	COMPANY	<u>VENUE</u>	<u>DATE OF BOND</u>	<u>BOND</u>	NEWS SOURCE	<u>DATE</u>
Dennis Kozlowski/(former CEO)	Tyco	NY	9/27/02	\$100 million bail bond secured by \$10 million in cash. Turned over passport.	Financial Times; New York Daily News	9/28/02 7/31/03
William T. Owens/(former CFO)	HealthSouth Corp.	USDC for ND Ala	post 3/20/03	\$500 bond and ordered to stay in the country.	Northwest Arkansas online	3/27/03
Gene Phillips	American Realty Trust Corp.	S.D.N.Y. N.D. TX	2000	The US District Court for the Northern District of TX ordered: (1) turn over passport; (2) travel was restricted to TX and NY for court appearances; (3) order to refrain from possessing dangerous weapons or narcotics without prescription; (4) participate in home detention program with electronic monitoring. The SDNY ordered: (1) \$1 million bond secured by cash or real property; (2) travel restricted to continental US upon 24 hours written notice to the government setting forth the itinerary; and (3) pretrial services officer supervision in Northern District of TX.	Orders from courts	

NAME/TITLE	COMPANY	<u>VENUE</u>	<u>DATE OF BOND</u>	<u>BOND</u>	NEWS SOURCE	<u>DATE</u>
Frank Quattrone	Credit Suisse First Boston	S.D.N.Y.	4/23/03	Released on own recognizance and ordered to surrender his passport.	USA Today	4/23/03
John, Michael and Timothy Rigas	Adelphia	S.D.N.Y.	7/8/02	Each posted a \$10 million bond secured by \$1 million in cash from John and \$500,000 from each son and mortgages on their personal property. The bond had to be cosigned by the other two defendants and Doris Rigas (wife and mother). Each surrendered his passport. Travel restricted to NY, NJ, and PA unless otherwise authorized by the prosecutor.	Knight-Ridder Tribune Business News: The Buffalo News National Post; Newsbytes News Network	7/25/02 8/3/02 9/12/02
Martha Stewart	Associated with ImClone	S.D.N.Y.		\$10 million bond.	National Post	8/3/02

NAME/TITLE	COMPANY	<u>VENUE</u>	<u>DATE OF BOND</u>	<u>BOND</u>	NEWS SOURCE	<u>DATE</u>
Scott Sullivan	WorldCom	S.D.N.Y., 02-Cr- 1144	9/4/02	\$10 million bond. Turned over passport.	The Wall Street Journal Europe; New York Daily News BNA	9/5/02; 7/31/03
Mark Swartz/(former CFO)	Tyco	Supreme Ct. NY	10/11/02	\$50 million; \$5 million was put up in stock and real estate by his parents and in-laws. Additionally, each person agreed to accept responsibility for the entire \$50 million bond.	St. Louis Post- Dispatch	10/12/02
Sam Waksal/(former CEO)	ImClone	S.D.N.Y., 02 Cr. ____	6/12/02	\$10 million bond with the condition that \$5 million of the bond be turned over in cash. Under an agreement with prosecutors, Harlan Waksal cosigned the bond. Waksal had to turn over his passport and any plane tickets he possessed.	South Florida Sun- Sentinel Transcript of CNBC: Business Center broadcast BNA	6/13/02 6/12/02